THE LAW SCHOOL.

IN THE MOOT COURT.

Coram THAYER, J.

Catseye v. *The Town of Camden.*

Tribal Indians, while off their reservation and within a State, are protected by the fourteenth amendment of the Constitution of the United States, as being persons entitled to the equal protection of the laws.

Where a statute giving an action against towns for injuries suffered by reason of a defect in the highway excepts such Indians from the benefits of it, the excepting clause is unconstitutional and void.

The plaintiff, an Indian belonging to the Sioux tribe and living on a Government reservation, having visited the defendant town, was injured by reason of a defect in a highway and brought an action of tort against the town for damages. The Statute of the State gave to all persons who might suffer an injury under such circumstances an action against the town; but it expressly excepted "all citizens or inhabitants of other States or countries not giving, under the same circumstances, a like right of action against the municipalities of such States or countries to citizens of this State; and also, all Indians in the United States, members of a tribe and living or belonging on a Government reservation." At the trial the defendant asked the judge to rule that the plaintiff could not maintain his action, but the judge refused so to rule and held that the excepting clause was void, as being contrary to the Constitution of the United States in denying to the plaintiff the equal protection of the laws. To this ruling the defendant alleges exceptions.

W. B. Brice and *R. S. Gorham* for Plaintiff.

W. H. Cowles and *F. Ladd* for Defendant.

This case, which was very well argued, raises the question whether a tribal Indian, residing on a Government reservation, is protected, while outside the reservation and within a State, by that clause of the fourteenth amendment to the United States Constitution which forbids a State to "deny to any person within its jurisdiction the equal protection of the laws."

This language is very broad. The fourteenth amendment conferred or recognized citizenship in the case of "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," — a description which does not cover tribal Indians, *Elk* v. *Wilkins*, 112 U. S. 94, 102; and it also forbade a State to abridge the privileges of citizens of the United States. It then took a wider range, and protected not merely citizens, but all persons, — "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Unnaturalized foreigners are protected by these last clauses, including foreigners whom our laws do not at present permit to be naturalized, like the Chinese. *Yick Wo* v. *Hopkins*, 118 U. S. 356. No human being, however degraded, belonging in any obscure corner of Asia, Africa, or Europe, would be outside these provisions of our Constitution if he should come to any of our States. The "Hottentot Venus" (13 East, 195), if she were now living and

were brought here for exhibition, would be protected by them. If our native Indian tribes are not covered by them, they are the only human beings of whom that is true.

It must be carefully observed that the question relates to an Indian while within a State and off his reservation; it has nothing to do with the case of an Indian on his reservation.

What, then, is there in the character of a tribal Indian to take him out from these clauses of the Constitution? He is a "person," in the sense of being a human being; and why are we to give to the term in this part of the Constitution any narrower meaning than that which includes all human beings? It is said that a tribal Indian living on a reservation is neither a citizen of this country, nor a member of any foreign State. That is true. Indian tribes are not foreign States, *The Cherokee Nation* v. *Georgia*, 5 Pet. 1; and the members of them are not citizens or subjects of a foreign State, *Karrahoo* v. *Adams*, 1 Dillon, 344; and if it were true that all persons must be either citizens here, or citizens or subjects of a foreign country, then, indeed, tribal Indians would not be "persons." But it would be a begging of the question to say that. We have, in these tribal Indians, a class of human beings who are neither one nor the other. No doubt their position is very peculiar, and various phrases have been invented to describe it, such as, "domestic dependent nations," 5 Pet. 17; and "wards of the nation," 118 U. S. 383. But both in the Constitution and Statutes of the United States they are referred to as persons. Const. U. S., Art. 1, s. 2; 112 U. S. 112. In large numbers they have been made citizens of the United States. 19 Howard, 587; 112 U. S. 112. They may, when off their reservations, sue in the courts, and are fully recognized as having legal rights and duties. This last statement is sometimes denied; but the denial is ill-considered, and proceeds upon a misunderstanding of a certain peculiar class of cases, such as that of *The Cherokee Nation* v. *Georgia*, 5 Pet. 1, and *Karrahoo* v. *Adams*, 1 Dillon, 344, turning wholly upon the limitations of the jurisdiction of the courts of the United States. In the last case, for instance, it was admitted that the court had no jurisdiction of the case, if the plaintiff, a tribal Indian woman, were not a foreigner; and it was held that she was not. And so, in any like case in the United States courts, wherever jurisdiction depends wholly on the fact that a party has the status either of a citizen of the United States or of a foreign State, — it is true that an Indian cannot sue.

But there are many cases in which jurisdiction does not depend upon the party having such a status, and in all such cases an Indian off his reservation can sue in the United States court as well as in the courts of the States. *Fellows* v. *Blacksmith*, 19 How. 366; *Elk* v. *Wilkins*, 112 U. S. 94; *Pka-o-wah-ash-kum* v. *Sorin*, 8 Fed. Rep. 740; *Wau-pe-mau-qua* v. *Aldrich*, 28 *ib.* 489; *Swartzel* v. *Rogers*, 3 Kansas, 374; *Willey* v. *Keokuk*, 6 *ib.* 94. It appears, then, to be true that the clauses of the fourteenth amendment, now under consideration, are, in the language of the Supreme Court of the United States (Matthews J.), "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S., at p. 369. And the remark of Taney, C. J., in *Scott* v. *Sandford*, 19 How., at p. 403, appears to be substantially accurate when he says that if an

Indian "should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which belong to an emigrant from any other foreign people." If this was true in 1856, it is no less true since the fourteenth amendment; and it is as true of any Indian who is a transient visitor among the whites as it is of a permanent resident.

But it is said that the statute which gives an action in this case is simply a punitory measure against the town, and that the excepted persons are not thereby deprived of the equal protection of the law. If this were a true description of the character and purpose of the statute, it is by no means certain that it would support the defendant's conclusion. But it seems not to be the just view of the statute. There was no private action at common law in such cases, because the town was considered to be acting as an agency of the public, and its duty was considered to be owing to the public, and not to any individual; and the remedy was in the name of the public by indictment, a proceeding in this sort of case which was criminal only in form. *Mower* v. *Leicester*, 9 Mass. 247; *Hill* v. *Boston*, 122 Mass. 344; *Gibson* v. *Preston*, L. R. 5 Q. B., at p. 222; *Queen* v. *Stephens*, L. R. 1 Q. B. 702. When a private action of tort is given against the town, it is given for the benefit of the injured person, that he may recover compensation for his injury. And if this benefit is conferred upon one class of persons and denied to another class, the law establishes inequality of benefit or privilege. If in giving a new action, such a discrimination may be made, it would seem, on the same principle, that an existing right might be taken away from some and not from others. And if one action or remedy may be taken away from a given class of persons, five or ten actions, or all of them, may be taken away. But, as it has been said by the Supreme Court of the United States, the granting of "the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo* v. *Hopkins*, 118 U. S., at p. 369. Accordingly, in *Pearson* v. *Portland*, 69 Maine, 278, it was held that a statute similar to the one now in question which took away the action from citizens of other States or countries that did not give a like remedy in like cases to citizens of Maine was unconstitutional, as denying to such foreigners the equal protection of the laws.

It is urged that this legislation is a legitimate exercise of the police power; but by whatever name it be called, it seems to be, in truth, an attempt by one State to secure a certain benefit for its citizens which is now denied to them in other States and countries, by means of a denial to the citizens of these other States or countries of the equal benefit and protection of the laws within its own borders. This particular mode of accomplishing the object, whether it be called an exercise of the police power or anything else, is in terms forbidden by the Constitution. And it may be added that, as regards Indians in the cause at bar, it is a total and absolute denial of the benefit of this action against the towns without any qualification whatever,— a denial to all of them, as a class, of a privilege which is totally and absolutely denied to no one else. But the fourteenth amendment secures full equality of protection to all persons. In commenting on the two clauses of the fourteenth amendment relating to "persons," it was said by the Supreme Court (Strong, J.), in *Strauder* v. *West Virginia*, 100 U. S. 303, 307, in language as applicable to all other

persons as to the negroes: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations implying inferiority in civil society; lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It is possible that some qualifications are necessary to this statement (*People* v. *Gallagher*, 93 N. Y. 438); but, taking it as substantially true, I am not aware of any reason why that which is here said of the scope of the protection and immunity afforded by these clauses to the blacks is not also true as regards any other "person." That part, therefore, of the excepting clause of the statute now in question, which purports to exclude tribal Indians from the benefit of it, appears to be contrary to the Constitution of the United States.

It is urged that, if this be so, the court must hold the whole statute unconstitutional, because, otherwise, a judicial tribunal would, in effect, be legislating Indians into the privileges of the statute, and giving them a benefit which the Legislature never intended that they should have. But I think this argument rather plausible than sound. It is well settled that a part only of a statute may be held to be void and the rest remain in force. "When part of a statute is unconstitutional, that will not authorize the Court to declare the remainder of the statute void unless all the provisions are . . . so connected in meaning that it cannot be presumed that the Legislature would have passed one without the other." *Com.* v. *Hitchings*, 5 Gray, at p. 485; Sedgwick on Construction of Stat. and Const. Law, 2d ed., 43, note (*a*). In this case the Legislature gave a general right, and excluded from it what may fairly be supposed to be a small class of persons. This exclusion is unconstitutional; but there is nothing to indicate that the Legislature regarded the exclusion as an essential part, or in any other light than as a quite subordinate part of their general purpose.

Exceptions overruled.

CLUB COURTS.

SUPREME COURT OF THE POW-WOW.

Fire Insurance. Loss occasioned by the felonious Act of the Wife of the Assured. Rights of the Insurer.

The facts were these: A insured B's house. B's wife, C, without the connivance of B, maliciously burned the house with the intention of enabling B to get the insurance money. A, having paid the policy to B, sues C. The argument against recovery is that A's only remedy is to be subrogated to the rights of B against C; but as a husband cannot sue his wife, A has no remedy whatever against C. This reasoning would undoubtedly prevail in England today. [*Cf. Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561.]